Iron Workers Local 386 *and* Warshawsky & Company. Case 33–CC–1202

May 14, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On June 3, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN GOULD, concurring.

I agree with my colleagues' finding that the Respondent, Iron Workers Local 386, did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by handbilling the construction site. I write separately, however, because I believe that the instant facts present a close case and therefore warrant a careful examination to determine the lawfulness of the Respondent's conduct.

The facts are not in dispute. Warshawsky & Company was constructing a warehouse and a mail order facility. G.A. Johnson and Son, the general contractor for the project, hired several subcontractors who maintained collective-bargaining agreements with various unions. In addition, in March 1997,[1] Warshawsky hired Automation, Inc., a nonunion contractor, to perform certain installation work at the project.

On March 12, Automation commenced working at the construction project. The Respondent was informed that, unlike the general contractor and the subcontractors who worked at the construction site from 7 a.m. to 3:30 p.m., Automation would be working at the site from 4 p.m. to 6 a.m. From March 13 through 19, the Respondent, starting at 6:30 a.m. each day, distributed handbills to employees of the general contractor and the subcontractors as they approached the entrance to the construction site. The handbill stated:

AUTOMATION, INC.
IS *DESTROYING*
THE STANDARD OF
WAGES FOR
HARD-WORKING
UNION MEMBERS

AUTOMATION, INC.
PAYS SUBSTANDARD
WAGES AND FRINGE BENEFITS

IGNORING THE AREA STANDARDS
THREATENS THE EFFORTS
AND SACRIFICES
OF ALL UNION MEMBERS

> Iron Workers Local 386 is currently engaged in labor dispute concerning the failure of Automation. Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

The handbillers also spoke to the employees as they approached the site, but there is no evidence revealing what was said to the employees. After talking with the Respondent's agents and receiving the handbills, employees of the general contractor and the subcontractors refused to enter the construction site and report for work with their respective employers.

As I stated above, the foregoing facts present a close issue of whether the Respondent induced employees of the general contractor and subcontractors to cease performing work. Although there is no direct evidence of such inducement, the facts arguably suggest that the Respondent was indeed making an appeal, through a careful wink and a nod, for the employees to engage in a work stoppage.

Such an argument is raised by the following facts. The Respondent chose to handbill the site when its audience would consist solely of the neutral employees. Additionally, the handbill's message—although disclaiming any interest in a work stoppage—reasonably conveyed the Respondent's desire to engage the neutral employees in the Respondent's dispute with Automation. Consistent with such an appeal, the neutral employees refused to report to work on receiving the Respondent's handbills.

In view of the foregoing facts, I am concerned that the Respondent's conduct was, in effect, a thinly veiled attempt to evade the Act's prohibition of inducing a work stoppage by the neutral employees. However, a careful consideration of the facts and the relevant case law persuades me that the record is insufficient to support a finding of a violation of the Act.

In reaching this conclusion, I rely primarily on *Building & Construction Trades Council of Tampa (Tampa Sand & Material Co.)*, 132 NLRB 1564, 1565 (1961). There, union business agents commented to

[1] All dates refer to 1997.

employees ''that they had the right, as individuals, not to handle [the primary's] product.'' A union agent also informed employees that that he had ''no preference with respect to a course of conduct,'' but that ''they had no job protection if they left their jobs, and that if replacements were requested, he would have to send them.'' The Board found that the union agents' remarks did not constitute an inducement or encouragement for employees to engage in a work stoppage, but rather were a declaration of what the law would permit. The Board stated that to attach a presumption of guilt to such a declaration would carry the ''nod, wink, and smile'' theory too far. Accordingly, the Board found that the remarks did not violate Section 8(b)(4)(i)(B) of the Act.

Like the conduct at issue in *Tampa Sand*, the Respondent's conduct here, although arguably consistent with an attempt to induce a work stoppage, ultimately lacks a sufficient basis to support such a finding. The ''nod, wink, and a smile'' theory cannot prevail in these circumstances where the handbill explicitly stated that the Respondent was not seeking a work stoppage, and where the record fails to show what the Respondent said to the employees as they approached the jobsite and received the handbills.[2] In the final analysis, a finding of a violation must be based on something more than the mere fact that the employees ceased work in response to the Respondent's conduct.[3] Accordingly, I find that the General Counsel has failed to establish that the Respondent induced or encouraged employees to engage in a work stoppage in violation of Section 8(b)(4)(i) and (ii)(B) of the Act as alleged.

[2] The instant case is distinguishable from *Service Employees Local 254 (Women & Infants Hospital)*, 324 NLRB No. 126 (Oct. 15, 1997), where the Board found that certain picketing and handbilling violated Sec. 8(b)(4)(ii)(B). There, the respondent's business agent admitted that the purpose of the picketing and the handbilling was to force the neutral hospital to cease doing business with the primary. Here, as noted above, there is no direct evidence of an unlawful purpose, and the handbills specifically state that the Respondent was not seeking the neutral employees to cease doing any work.

[3] See generally *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979).

Debra L. Stefanik, for the General Counsel.
Terrance B. McGann (Whitfield & Gregorio), of Chicago, Illinois, for the Respondent.
Michael W. Duffee and *Tracy A. Peterson (Matkov, Salzman, Madoff & Gunn)*, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. This matter has been presented on joint motion to accept a stipulation of facts, waiving hearing. On March 25, 1997,[1] the Regional Director for Region 33 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing based on an unfair labor practice charge filed on March 13, alleging, as amended, violations of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity tojoin, and have joined, in the stipulation of facts and have filed briefs. Based on that stipulation of facts, which constitutes the entire record, and on the briefs which were filed, I make the following

FINDINGS OF FACT

I. MOTION TO AMEND ANSWER

Paragraph 7(c) of the complaint alleges that, ''The conduct by Respondent described above in paragraphs 7(a) and (b) took place on the dates described in paragraph 7(a) only at times when individuals employed by Johnson and its Union subcontractors were reporting to work.'' The Respondent, Iron Workers Local 386, stated in answer to that allegation, ''The Respondent admits that it engaged in a lawful informational *picket* on March 13, 14, 17, 18 and 19, 1997. Answering further, the Respondent admits that the informational *picket* began between 6:00 a.m. and 7:00 a.m. on the listed dates.'' (Emphasis added.)

After the stipulation of facts had been submitted and received, and shortly before briefs were due, the Respondent filed a motion to amend answer, seeking to substitute the word ''handbilling'' for the word ''picket'' wherever the latter appears in its answer to paragraph 7(c) of the complaint, representing that ''picket'' had been ''a typographical error.'' That motion has not been opposed by the General Counsel. However, the Charging Party, Warshawsky & Company (Warshawsky), filed an opposition to the motion, arguing that it is material, is belated, and that it would be prejudiced were the motion to be granted. Even should the motion be granted, further argues Warshawsky, the answer to paragraph 7(c) still should be considered an admission ''as evidence on the issue of picketing.''

It is long settled that a party is bound by admissions of its counsel. *Oscanyan v. Arms Co.*, 103 U.S. 261, 263–264 (1880). Thus, ''a statement in a pleading constitutes a 'judicial' admission that is binding on the party making the admission.'' (Citation omitted.) *D. A. Collins Refractories*, 272 NLRB 931, 932 (1984). However, the Board continued in that case, such ''judicial'' admissions lose their binding effect whenever an amended pleading is filed, though ''[t]he statement still stands as an admission if introduced in evidence as such'' (272 NLRB 932 fn. 3), but still ''is subject to explanation and rebuttal by the party making the admission.''

While it seems somewhat of a stretch to apply the adjective ''typographical'' to the Respondent's ''error,'' regarding the conduct identified in its answer to paragraph 7(c), it does seem that insertion of the word ''picket'' had been an error. Neither paragraphs 7(a) nor (b) of the complaint, describing the predicate alleged conduct to which paragraph 7(c) makes reference, allege that there had been actual picketing. Only ''appeal[s]'' that included ''signal picketing and passing out

[1] Unless stated otherwise, all dates occurred during 1997.

of handbills'' are alleged as conduct in which the Respondent had engaged. As described in section III, infra, by definition ''signal picketing'' is a substitute for actual picketing—a form of constructive picketing. Accordingly, the conduct to which the complaint's paragraph 7(c) points, in paragraphs 7(a) and (b), makes no mention whatsoever of actual picketing.

As to the substance of those latter two paragraphs, in its answer, the Respondent denied flatly that its appeals had included even ''signal picketing and the passing out of handbills[.]'' In consequence, both the allegations serving as the predicate for paragraph 7(c) and the Respondent's answer to those predicate allegations serve to support the motion's assertion that use of the word ''picket'' had been an ''error.''

In addition, the stipulation of facts, signed on behalf of all parties, includes no description of conduct which constituted picketing. As described in section II, infra, only handbilling had been conducted on the March days enumerated in the complaint as ones on which unlawful secondary conduct assertedly had occurred. In light of the stipulation, to conclude that there had been an ''informational picket'' on those dates would be a conclusion at odds with the facts. Obviously, one still could conclude that there had been ''signal picketing'' on those dates—and that the Respondent had intended its handbilling to serve as a substitute for picketing. But, any such conclusion should be based on the facts of what occurred, not on what appears to have been an error in selection of words. After all, no less than subpoenas, pleadings should not be reduced to ''a Donny Brook fair and every lawyer a Don Quixote tilting at windmills for the feel of the fighting.'' *Winn & Lovett Grocery Co. v. NLRB*, 213 F.2d 785, 786 (5th Cir. 1954).

Therefore, I grant the Respondent's motion to amend answer by substituting the word ''handbilling'' for ''picket'' in the portion of the original answer to paragraph 7(c) of the complaint. Even though the motion was made after the stipulation of facts had been filed and received, Warshawsky has not moved to reopen the record should the motion be granted. Nor has it enumerated any specific differences that it would have sought in the stipulation of facts should the motion be granted. And none is suggested from scrutiny of that stipulation and comparison of it to the allegations of the complaint. That is, there is no particularized showing which would support a conclusion that substitution of ''handbilling'' for ''picket'' in a single paragraph of the answer would necessitate revision of, or additions to, the stipulation of facts which has been submitted. Cf. *Liberty Natural Products*, 314 NLRB 630 (1994). Accordingly, there is no basis for concluding that any party is prejudiced by granting the Respondent's motion to amend answer.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case presents issues of whether handbills and the manner in which they were distributed during 5 days in March violated Section 8(b)(4)(i) and (ii)(B) of the Act.

The situs of the dispute in this case is located at the intersection of Murphy Road and J.C. Whitney Way in LaSalle, Illinois, where a warehouse and mail order facility is being constructed by Warshawsky, a Delaware corporation with its principal place of business in Chicago, Illinois, engaged in the warehousing and sale of auto parts and accessories.[2] At all times material hereto, the LaSalle site has been maintained as a construction project only and has not been open to members of the general public.

To construct that facility, Warshawsy has engaged, as the general contractor responsible for construction of the LaSalle warehouse and mail order facility, G. A. Johnson & Son, Inc. (Johnson), an Illinois corporation with its principal place of business in Evanston, Illinois, engaged in the construction business.[3] In turn, Johnson has subcontracted certain construction work at the LaSalle site to certain subcontractors: Five County Glass & Mirror, Inc.; R. G. Construction Services, Inc.; Hilltop Heating & Sheet Metal, Inc.; J. B. Contracting Co.; Dan Car Sprinkler Co.; Scurto Cement Construction, Ltd.; Star Erectors, Inc.; and Schweickert Masonry.[4] Johnson and those subcontractors performed work at the LaSalle site during the hours of approximately 7 a.m. and 3:30 p.m., Mondays through Fridays, as well as occasionally on Saturdays.

All of the above-named subcontractors maintain collective-bargaining contracts with various building trades unions which represent the employees of those subcontractors who are working on Warshawsky's LaSalle warehouse and mail order facility project. At no time material hereto has the Respondent[5] been engaged in a labor dispute with Johnson nor with any of the above-named subcontractors whose employees are working on that project.

During March, Warshawsky retained Automation, Inc. (Automation) to install certain rack and conveyor systems at its LaSalle warehouse and mail order facility project. On March 5 the Respondent engaged in area standards picketing of Automation at that project. However, on being informed that Automation was not yet working at that site, the Respondent ceased its picketing at the LaSalle project, apparently on the same day as it had begun picketing there.

By letter dated March 12, Warshawsky's vice president, human resources, Clyde D. Rundle, notified the Respondent's financial secretary/business agent Daniel F. Aussem[6] that, inter alia, Automation, ''its employees and suppliers, will be present at [Warshawsky's] project in LaSalle, Illinois on

[2] In the conduct of its normal business operations during the 12-month period preceding execution of the stipulation of facts, a representative period, Warshawsky has derived gross revenues in excess of $500,000 and, moreover, has purchased goods valued in excess of $50,000 which it received directly from sources outside of the State of Illinois and, also, has sold goods valued in excess of $50,000 which it shipped from its Illinois facility directly to sources outside of the State of Illinois. Therefore, at all material times, Warshawsky has been engaged in an industry affecting commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] In the course of conducting those operations during the 12-month period preceding execution of the stipulation of facts, a representative period, Johnson purchased goods valued in excess of $50,000 which it received directly from sources outside of the State of Illinois. Therefore, at all material times Johnson has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[4] Each of those subcontractors are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[5] At all material times the Respondent has been a labor organization within the meaning of Sec. 2(5) of the Act.

[6] An admitted agent of the Respondent within the meaning of Sec. 2(13) of the Act.

Monday through Saturday only between the hours of 4 p.m. and 6 a.m., and all day Sunday until further notice and will not be present at said project at any other time.'' The letter continued by promising, ''You will be advised not less than 24 hours in advance of any changes to this schedule''; by requesting that the Respondent ''confine any picketing of Automation . . . to the above listed times''; and, by warning that, ''[a]ny picketing of Automation . . . at times when it is not scheduled to be present at this site will result in the filing of . . . charges with the . . . Board as well as an action in federal court for any damages resulting from such unlawful activity.'' There is no evidence as to how that letter was transmitted to the Respondent nor as to when, if ever, it had been received by the Respondent.

Automotion commenced work for Warshawsky at LaSalle on March 12 during times conforming to those set forth in Rundle's above-described letter to the Respondent of that same date. At all times between March 12 and 19 Automation, its employees and subcontractors were present at Warshawsky's LaSalle warehouse and mail order facility construction project only during the times set forth in that letter.

At approximately 6:40 a.m. on March 13 various admitted agents of the Respondent were stationed at certain locations along Murphy Road, a road used primarily by individuals going to and from the Warshawsky project, near J. C. Whitney Way, in close proximity to the entrance to Warshawsky's project. Those agents were there for approximately 3 to 4 hours on March 13. They returned there about 6:30 a.m. on March 14, 17, 18, and 19 for approximately 3 to 4 hours on each date. At no time on any of those dates did the Respondent or its agents appear at Warshawsky's LaSalle construction project at times when Automation, its employees, suppliers, and subcontractors were present at that site.

As to the actions of the Respondent's agents while at the project, they engaged in two types of conduct directed to employees of Johnson and those of its subcontractors as those employees attempted to drive their vehicles into Warshawsky's construction site. First, the Respondent's agents ''briefly spoke with . . . [those] individuals,'' but, the parties stipulated, ''There is no evidence that reflects the content of those conversations.''

Second, in addition to speaking with those individuals, the Respondent's agents distributed a copy of a handbill to each of them. That handbill states:

AUTOMATION, INC.
IS *DESTROYING*
THE STANDARD OF
WAGES FOR
HARD-WORKING
UNION MEMBERS

AUTOMATION, INC.
PAYS SUBSTANDARD
WAGES AND FRINGE BENEFITS

IGNORING THE AREA STANDARDS
THREATENS THE EFFORTS
AND SACRIFICES
OF ALL UNION MEMBERS

At the bottom of the handbill appears the following statement:

> Iron Workers Local 386 is currently engaged in a labor dispute concerning the failure of Automation, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

The first six above-quoted lines in the handbill are in approximately 11/32-inch type size. The next six lines are in approximately 6/32 inches or 3/16-inch type size. The disclaimer at the bottom is in much smaller 4/32-inch type size.

Following the above-described discussions and receipt of handbills on March 13, individuals employed by Johnson and by its subcontractors refused to enter Warshawsky's LaSalle warehouse and mail order facility construction project, thereby refusing to perform services there for their respective employers. Similarly, on March 14 and 17–19, the parties stipulated, ''Various individuals employed by Johnson and the . . . subcontractors continued to refuse to enter onto the LaSalle facility construction project or to perform services for their employers from March 13 through 19, 1997.''

The General Counsel and Warshawsky contend that the foregoing facts establish that, by its handbilling at the LaSalle project, the Respondent unlawfully induced and encouraged employees of Johnson and of its subcontractors to refuse in the course of their employment to perform services for their own neutral employers—thereby threatening, coercing, and restraining those neutral employers—for the ultimate object of forcing and requiring Warshawsky to cease doing business with Automation. For the reasons set forth in section III, infra, I conclude that a preponderance of the above-described evidence fails to establish that the failure of some of those employees to report for work, on March 13, 14, and 17–18, had been other than a spontaneous reaction by those employees to the Respondent's lawful actions of publicizing, other than through picketing or through conduct tantamount to picketing, undisputed facts about Automation's wages and benefits.

III. DISCUSSION

To the extent pertinent here, Section 8(b)(4)(i) and(ii)(B) of the Act makes it unlawful for a labor organization or its agents,

> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

Thus, to establish a violation of that section of the Act, there must be evidence showing, or from which it can be inferred, both that a respondent engaged in unlawful conduct, within the meaning of Section 8(b)(4)(i) or (ii) and, second, evidence showing, or from which it can be inferred, that such conduct had an object proscribed by Section 8(b)(4)(B) of the Act. That is, a preponderance of the evidence must establish both unlawful conduct and unlawful action.

In their briefs each of the parties refers to one or the other of the Supreme Court's decisions in *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983) (*DeBartolo I*) and in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II*) though for different reasons. The results of those two cases are not dispositive of the ultimate issues presented in the instant case, however, though some of the reasoning utilized to reach those results in the *DeBartolo* cases does have application to the instant situation.

In the first place, both *DeBartolo* cases addressed only (4)(ii) conduct: threats, coercion or restrain of ''any person engaged in commerce or in an industry affecting commerce[.]'' Not addressed in either case was the (4)(i) conduct of ''induce[ing] or encourage[ing] any individual employed by any person engaged in commerce or in an industry affecting commerce[.]'' That distinction is significant. For, as the Court pointed out in *DeBartolo II*, '''induce[ing] or encourage[ing]' employees of the secondary employer to strike is proscribed by [Section] 8(b)(4)(i). But more that mere persuasion is necessary to prove a violation of [Section] 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints.'' 485 U.S. at 578. In contrast to (4)(ii) conduct, which is confined to situations involving ''economic pressure of a compelling or restraining nature,'' *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975), ''The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion.'' *Electrical Workers IBEW v. NLRB*, 341 U.S. 697, 701–702 (1951).

The allegations of the instant case, therefore, address a type of conduct, under Section 8(b)(4)(i) of the Act, which did not confront the Supreme Court in either *DeBartolo* case. Moreover, whenever inducement or encouragement of a neutral or secondary employer's employees occurs ''in the presence of a secondary employer[, it] constitutes coercion of that secondary employer within the meaning of the statute.'' (Citation omitted.) *Newspaper & Mail Deliverers (New York News)*, 269 NLRB 102 fn. 2 (1984). Inasmuch as the Supreme Court was not confronted with an allegation of (4)(i) conduct in the *DeBartolo* cases, neither did it have the opportunity to address the (4)(ii) allegation of those cases in the context of (4)(i) conduct.

Secondly, unlike the situation in *DeBartolo I*—and, for that matter, in a significant part of the analysis in *DeBartolo II*—the instant case does not present a situation where the so-called publicity proviso of Section 8(b)(4) is at issue. In pertinent part, that proviso states:

> *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit *publicity, other than picketing*, for the purpose of truthfully advising *the public, including* consumers and *members of a labor organization*, that *a product or products* are produced by an employer with whom the labor organization has a primary dispute and *are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment* to refuse to pick up, deliver, or transport any goods, or *not to perform any services, at the establishment of the employer engaged in such distribution*[.]'' [Emphasis added.]

A comparison of the underscored portions of that proviso with the facts of the instant case discloses several reasons why the proviso does not apply to the situation presented here.

As set forth in section II, supra, the parties stipulated that ''individuals employed by Johnson and [by its] subcontractors refused to enter into [Warshawsky's] LaSalle facility construction project and perform services for their respective employers'' on March 13 and, also, during succeeding work days when handbilling occurred there. So, even assuming that Warshawsky distributes products ''produced'' by, in essence, construction employees of Automation—a conclusion reached by the Supreme Court in *DeBartolo I* (''that construction workers, like truck drivers, may perform services that are essential to the production and distribution of consumer goods'') on the basis of an assumption (''we may assume here'') based, in turn, on *DeBartolo*'s ''willing[ness] to concede that Wilson distributes products that are 'produced' by High'' (463 U.S. at 155)—the stipulated facts establish that the Respondent's handbilling did ''have an effect of inducing . . . individual[s] employed by . . . person[s] other than [Automotion] in the course of [their] employment . . . not to perform . . . services[s]'' for their own employers at the LaSalle project.

Beyond that, the handbills were confined to publicizing the asserted fact that Automation's wages and fringe benefits did not rise to the level of the standards for the LaSalle area. At

no point did they claim the fact that Warshawsky, or any of the other employers at the LaSalle site, was, or would be, distributing Automation's product. In consequence, the Respondent failed to engage in the very conduct to which the publicity proviso addresses its protection.

The Respondent argues that Murphy Road ''was not used exclusively by employees of Johnson and other subcontractors,'' but is a ''public road . . . used by individuals with no association to the LaSalle Facility and who received the identical handbill received by employees of neutral employers.'' Those asserted facts are not truly supported by the parties' stipulation of facts. Even if they were supported by it, however, the handbills' limited message deprives the Respondent's conduct of protection under the publicity proviso, because those handbills were not publicizing distribution by Warshawsky, nor by any other employer, of a product produced by Automation.

In fact, the stipulated facts leave scant room for any conclusion that the handbills had been intended for anyone other than persons reporting for work at the LaSalle project. There is no basis in the stipulation that would allow even an inference that handbills had been actually distributed to anyone else. There is no express stipulation to that effect. The stipulation of facts recites only that copies of the handbill had been given ''to[ ] individuals employed by Johnson and its union subcontractors as those individuals attempted to drive their vehicles into the LaSalle facility construction project.'' The handbilling occurred only during mornings when those individuals were reporting, or were most likely to report, for work. There is no evidence that handbilling occurred during the afternoons and evenings when ''individuals with no association to the LaSalle Facility'' presumably were no less likely to be traveling Murphy Road than during mornings.

Given the totality of the foregoing considerations, it cannot be concluded that the publicity proviso applies to the allegedly unlawful March conduct in which the Respondent and its agents engaged at Warshawsky's LaSalle warehouse and mail order facility construction project. Even so, that conclusion does not conclude further analysis of the Respondent's conduct. In *DeBartolo II*, the Supreme Court held that the publicity proviso is an express ''clarification'' by Congress of the reach of Section 8(b)(4)'s prohibitions, rather than being an exception to those prohibitions: ''[W]e agree with that conclusion,'' (485 U.S. at 584), by the court of appeals, that the proviso had been '''drafted as an interpretive, explanatory section' and not as an exception to an otherwise all-encompassing prohibition on publicity in [Section] 8(b)(4).'' 485 U.S. at 574. That holding is important to resolution of the instant case.

First, the fact that the proviso is an express ''clarification,'' rather than an exception, is some indication that Congress contemplated other, unstated, clarifications which would inform resolution of issues arising under Section 8(b)(4) of the Act's stated prohibitions. Second, such unstated clarifications arise in the context of the publicity proviso's above-quoted definition of ''the public'' which embraces both ''consumers and members of a labor organization[.]'' Inasmuch as the proviso serves as a clarification, rather than an exception, the reach of the prohibition which it interprets, explains, and clarifies must, of necessity, take into account publicity of disputes which is directed to members of labor organizations, without too readily concluding that such publicity constitutes unlawful inducement or encouragement.

As will be discussed below, that appears to be a conclusion which the Board has reached and adhered to for some time. The significant point here is that, in its expressed clarification of the publicity proviso, Congress did include ''members of a labor organization'' within the scope of the publicity proviso's exclusion of publicity ''advising the public[.]'' Moreover, Congress did not confine that inclusion to members of the labor organization engaged in that publication. That is, it did not confine the interpretive and explanatory language to a labor organization's own members. Rather, the language is sufficiently broad to allow the clarification to reach publicity directed to members of any labor organization or organizations. Consequently, the fact that the Respondent distributed handbills to members of other labor organizations does not, standing by itself, necessarily establish that the Respondent had engaged in unlawful (4)(i) inducement or encouragement.

It also is significant that the Respondent did not engage in actual picketing on any of the five March dates enumerated in the complaint as being ones on which unlawful activity allegedly had taken place. Instead, on all five dates the Respondent's conduct had involved distributing handbills, without any picketing or patrolling. Endorsing a concurring opinion of Justice Stevens in an earlier decision, the Supreme Court stated in *DeBartolo II*,

> picketing is ''a mixture of conduct and communication'' and the conduct element ''often provides the most persuasive deterrent to third persons about to enter a business establishment.'' Handbills containing the same message, he observed, are ''much less effective than labor picketing'' because they ''depend entirely on the persuasive force of the idea.'' [485 U.S. at 580, quoting from the concurring opinion in *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980).]

That, also, was the point made earlier by Justice Douglas when he stated that ''the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of the ideas which are being disseminated.'' *Bakery & Pastry Drivers & Helpers Local 801 v. Wohl*, 316 U.S. 643 (194). Not only is a handbill generically different from picketing, the Court pointed out in *DeBartolo II*, but statements in handbills constitute ''expressive activity'' the legislative proscription of which ''would pose a substantial issue of validity under the First Amendment.'' 485 U.S. at 575–576.

Of course, that does not mean that handbilling enjoys unfettered exemption under Section 8(b)(4) of the Act, regardless of the message being communicated and the means by which it is conducted. ''We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection.'' *DeBartolo II*, 485 U.S. at 576. Under the First Amendment, Congress can validly oblige labor organizations to confine the pressure which they bring ''on offending employers in primary labor disputes'' to means which shield ''unoffending employers and others from pressures in controversies not their own.'' *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). Espe-

cially in the context of common situs situations, labor organizations must make reasonable efforts to minimize the impact of their messages on neutral employers and their employees. But, in doing so, those labor organizations are not required to abandon altogether communication of their messages.

Both the Board and the circuit courts of appeals have extended the statutory prohibition of Section 8(b)(4)(i) and (ii)(B) to handbilling when conducted in such a manner as to be tantamount to actual picketing. For example, where the handbills are distributed by persons who are actually picketing, or by persons who are not themselves actually picketing but whose handbilling is accompanied by others who are picketing, the handbilling has been regarded as an integral component of the totality of that labor organization's picketing and, accordingly, has been measured by the principles applied to ''the mixture of conduct and circumstances,'' *DeBartolo II*, supra, which constitute picketing. See, e.g., *San Francisco Building Trades Council (Goold Electric)*, 297 NLRB 1050, 1057 (1991).

Even without actual picketing, however, the circumstances under which handbilling may occur can be such that the handbilling constitutes, in reality, no more than sheep's clothing for the actual wolf of picketing. Such activity is regarded as ''signal picketing''—''the term used to describe activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union.'' (Citation omitted.) *Operating Engineers Local 12 (Hensel Phelps)*, 284 NLRB 246, 248 fn. 3 (1987). Signal picketing occurs whenever a labor organization is ''not merely engaged in communicating the information set out in the handbills, but [is] actually seeking in distributing such handbills to convey a 'signal' to induce those confronted by its agents to take the kind of action which traditional picket lines are expected to evoke.'' *Teamsters Local 688 (Levitz Furniture Co.)*, 205 NLRB 1131, 1133 (1973).

At first blush, those definitions might appear so broad as to embrace naturally any and all handbilling at a common site, where employees of several employers are working, and whenever some of those employees of neutral employers refuse to report for work after having received handbills. Indeed, that might appear to have been the conclusion reached on too hasty a reading of *Catalytic, Inc. v. Monmouth & Ocean County Building Trades Council*, 829 F.2d 430 (3d Cir. 1987), cert. denied 485 U.S. 1020 (1988): ''The simple cause-and-effect of the appearance of leafletters and work stoppages eloquently testified to the purpose of the enterprise'' and ''demonstrated that Local 825 sought to persuade other craft unions to violate their contractual no strike obligations.'' Still, the handbills or leaflets in that case were distributed in a no-strike contractual provision situation, carried a message broader than the one covered by the Respondent's handbill in that they actually protested assignment of mobile crane work to ''non-building trades,'' and charged the primary employer with being ''unfair'' for having done so.

Here in contrast, so far as the evidence reveals, there is no contractual obligation undertaken by the Respondent to Warshawsky, nor to Johnson or to its subcontractors. Resolution of the ultimate issue here is confined to the extent to which, consistent with the First Amendment and the Act, Congress can restrict expressive activity in a labor-management setting. Further, as pointed out above, the *Catalytic* handbills protested a work assignment to a particular employer. By contrast, the Respondent's handbill protests no more than wages and fringe benefits provided by Automation; no mention is made in that handbill of Warshawsky's choice of Automation to perform the rack and conveyor systems installation at LaSalle. Finally, no charge of unfairness, or of any other negative conduct, is made against Warshawsky, or any other employer aside from the primary employer Automation, in the Respondent's handbill.

To be sure, it may be argued that such distinctions give rise to no truly meaningful differences between the situation in *Catalytic* and that presented in the instant case, inasmuch as an appeal for support is implicit in any message to union members concerning an employer's failure to satisfy area standards. However, in *DeBartolo II* the Supreme Court recognized the constitutional and statutory protection extended to handbill messages protesting failures to satisfy area wage and fringe benefits standards—those which ''press[ ] the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace.'' 485 U.S. at 576. Therefore, when evaluating the lawfulness of such messages, even when disseminated to members of a labor organization at a common situs, analysis must proceed with care.

That some handbill recipients may interpret purely area standards messages as some form of appeal for refusals to perform work is not the determinative consideration. For, a reader's or, for that matter, listener's ''subjective interpretation'' of such a message is not the critical consideration under Section 8(b)(4)(B) of the Act. Rather, the Board has held that ''the critical considerations are the specific language used and surrounding conduct and events.'' (Citation omitted.) *Teamsters Local 82 (Champion Exposition)*, 292 NLRB 794, 795 (1989).

An example of application of that approach—and one which is instructive for the issues posed in the instant case—is a situation involving a business agent's statements to neutral employees that ''they had the right, as individuals, not to handle [the primary's] products,'' which arose in *Building & Construction Trades Council of Tampa (Tampa Sand & Material Co.)*, 132 NLRB 1564, 1565 (1961). The Board dismissed the complaint that case, concluding that, ''To read inducement and encouragement into the mere statement that the men could make an individual choice as to handling [the] products is to attach a presumption of guilt to a declaration of what the law will permit,'' inasmuch as, ''The law does not require that a union refrain from making the law known to its members.'' (132 NLRB at 1566.)

Similarly, in *Gould Inc*., 238 NLRB 618 (1978), enfd. 638 F.2d 159 (10th Cir. 1980), cert. denied sub nom. *Brown Boveri Electric v. NLRB*, 452 U.S. 930 (1981), there had been actual picketing with signs stating, ''Information: Houchin Electric does not have an agreement with Local Union 584, IBEW'' (238 NLRB at 619), and the respondent's business manager had told employees ''that whatever action the employees took would be their individual choice and action.'' (238 NLRB at 622.) Approximately 85 of 90 first-shift employees walked out. Nevertheless, the Board agreed that there had been no ''union authorization or union inducement within the meaning of Section 8(b)(4)(i) of the Act,'' relying on the holding of *Tampa Sand*. The employees' walkout was regarded as having been spontaneous. Consequently, the fact that readers of handbills may choose to

cease working on receipt of those handbills is not, standing alone, sufficient to establish that those employees had been induced or encouraged to do so within the meaning of Section 8(b)(4)(i) of the Act. More must be shown than simply a work cessation by some recipients for a conclusion that unlawful inducement or encouragement has occurred.

That ''more'' is what is supplied whenever signal picketing is concluded to have occurred. It has been concluded to have occurred whenever one or more of several objective factors have been present: accompanying placards which, though not actually carried by persons who are patrolling, have been placed in proximity to the handbillers and can be easily seen by persons accepting the handbills, *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 153 (2d Cir. 1963) (placards placed in a nearby snow bank); *Laborers Local 389 (Calcon Construction)*, 287 NLRB 570, 573 (1987) (signs placed near entrances so they could be read by handbill recipients); accompanying mass activity by crowds which exceed the numbers reasonably necessary for solely expressive activity, *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746, 748 (1993); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71–73 (1991); *Mine Workers District 12 (Truax-Traer Coal Co.)*, 177 NLRB 213, 217–218 (1969); accompanying appeals not to report for work or about a need for employees of neutral employers to, in effect, make common cause with handbillers, *Teamsters Local 315 (Santa Fe)*, 306 NLRB 616, 630–631 (1992); *Electric Workers IBEW Local 3 (General Dynamics Communications Co.)*, 264 NLRB 705, 705–706 (1982) (''total job'' policy); accompanying actions or statements which serve to show a handbilling union's willingness to support and to make efforts to protect employees of neutral employers who will refrain from working in support of the ostensibly handbilling labor organization, *Service Employees Local 87 (Trinity Maintenance)*, supra at 750 (seeking strike sanctions); *Truck Drivers & Helpers Local 728 (Genuine Parts Co.)*, 119 NLRB 399 (1957) (pledging ''combined economic power and resources'' to protect employees of neutral employees against retaliatory measures for participating in a ''hot cargo'' program); untruthful statements in the handbills about the nature of the dispute, *Service Employees Local 87 (Trinity Maintenance)*, supra at 745; and, a history or pattern of secondary harassment, *Electric Workers IBEW Local 3*, supra.

As quoted in section II, supra, the handbill distributed by the Respondent's agents at Washawsky LaSalle project is confined only to Automation. It makes no mention of any other employer and states no complaint about Warshawsky having chosen to assign rack and conveyor systems installation to Automation. Beyond that, neither the General Counsel nor Warshawsky have challenged the truthfulness of the handbill's protest: that Automation's wages and fringe benefits do not rise to the level which is standard in the LaSalle area. Cf. *Great American, 322 NLRB 17 (1996); Service Employees Local 254 (Janitronic, Inc.)*, 271 NLRB 750, 751–752 (1984). Nor is there an independent basis in the stipulation of facts for concluding that the handbill's statements, about Automation's wages and fringes, had been untruthful.

True, the handbill's message is phrased stridently. Even so, it would seem that protection of even a strident message about ''the dangers of inadequate wages to the economy and the standard of living of the populace,'' *DeBartolo II*, 485 U.S. at 576, is protected by the First Amendment and by the Act. Stridency, alone, is no basis for depriving area standards messages of such protection.

Seizing on the handbill's statement that ''IGNORING THE AREA STANDARDS THREATENS THE EFFORTS AND SACRIFICES OF ALL UNION MEMBERS,'' the General Counsel contends that the Respondent had been asking union employees ''not to 'ignore' the area standards violation,'' thereby implicitly advocating a work stoppage. By its very terms, however, the unstated subject of that statement is Automation, not the persons to whom handbills were being distributed. Read in context of the handbill's other statements, moreover, that becomes even more plain: that it is Automation which is ''*DESTROYING*'' the area standard by ''IGNORING'' that standard—not, as the General Counsel would have it, that recipients of handbills should not ignore that conduct of Automation.

In light of the foregoing considerations, the complaint is left with a handbill that does no more than truthfully advise recipients of facts about Automation's wages and fringe benefits. If labor organizations are not obliged under Section 8(b)(4)(i) and (ii)(B) to ''refrain from making the law known to [their] members,'' *Building & Construction Trades Council of Tampa (Tampa Sand)*, supra, then similar logic would appear to apply to making the facts known to their members. Furthermore, inasmuch as labor organization members are regarded as part of ''the public'' in the publicity proviso, and as that proviso is a clarification, rather than an exception, to the prohibitions of Section 8(b)(4) of the Act, there is no basis for distinguishing between dissemination of facts to a labor organization's own members and those who are members of other labor organizations.

After all, had the Respondent chosen, instead of handbilling, to publicize Automation's failure to satisfy area standards through the media, that area standards protest would have reached members of other labor organizations. Yet, surely no one can contend that Section 8(b)(4)(i) and(ii)(B) would be violated through ''newspaper, radio, and television'' protests, *DeBartolo II*, 485 U.S. at 583, merely because those protests are read, heard or seen by members of labor organizations other than those who were members of the Respondent.

Moving beyond the wording of the handbill, much is made of the fact that handbilling did not occur whenever Automation's employees were working on the project, but instead were distributed only when employees of Johnson and of its subcontractors were reporting, and were scheduled to report, for work during mid-March. But, that begs the point. Presumably, Automation's employees were not ignorant about their wages and fringes. Presumably, they were aware of the relationship between their wages and fringe benefits, on the one hand, and those which prevailed elsewhere in the area. Seemingly, nothing was to be gained by reinforcing that knowledge of Automation's employees by distributing the handbills to them. It had been the employees of Johnson and of its subcontractors who were less likely to have been aware of the facts about Automation's wages and fringe benefits. And under *Tampa Sand*, the Respondent was not required to refrain from informing Johnson's and its subcontractors' employees of those facts.

Of course, there is no evidence that the Respondent conveyed its message to any member of ''the public'' beyond

those persons who were attempting to enter Warshawsky's project during those five mornings in mid-March. Nonetheless, there is no evidence that the Respondent's agents confined distribution of their handbills only to employees of Johnson and of its subcontractors. So far as the evidence shows, anyone who started to enter the site was given a handbill, regardless of whether such persons were or were not employees and, further, regardless of whether such persons were or were not on the payrolls of Johnson and of its subcontractors.

Beyond that, nothing in Section 8(b)(4), or elsewhere in the Act, obliges labor organizations to publicize their disputes as broadly as possible to qualify as ''public'' publication. Dissemination to the butcher, the baker, and the candlestick maker is not necessary for handbilling to be beyond the prohibition of that section of the Act. More narrowly, labor organizations need not refrain from publicizing the facts of an area standards message to members of labor organizations unless, as a condition of doing so, they also republish those same facts to the employees who already are seemingly aware that their wages and fringe benefits do not rise to the standard of the area in which they are working.

The fact that the Respondent chose to handbill only at a common situs where Automation employees were working, but not during times when Automation's personnel actually was working, can be some evidence of a secondary object in certain situations. See *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950). Even so, that fact is not determinative when it is handbilling, the dissemination of ideas, which is involved, rather than the mixture of conduct and communication involved where there is picketing. *DeBartolo II*, supra. Beyond that, it should not escape notice that, at the bottom of the handbill, recipients were informed specifically that the Respondent was ''not seeking any person to cease work or to stop making deliveries.'' That is some evidence that ''Respondent effectively took steps to neutralize [any] implied inducement or encouragement of employees'' of other employers. *Service & Maintenance Employees Union No. 399 (The William J. Burns International Detective Agency)*, 136 NLRB 431, 437 (1962).

True, that wording is much smaller than the type used for the handbill's principal message printed above. Nonetheless, it should not be overlooked that the Respondent ''was not required to actively discourage [a] sympathy strike in order to disestablish any connection to secondary activity.'' *Gould Inc*., 238 NLRB at 622.

There is no evidence that, in conjunction with the handbilling, the Respondent or its agents had made appeals of a nature which, as discussed above, could serve as indicators of signal picketing. That is, there is no evidence that the Respondent appealed for employees of Johnson and of its subcontractors not to report for work or to make common cause with the Respondent. There is no evidence that the Respondent made any effort, such as by seeking strike sanctions or pledging efforts to protect anyone who turned away from the LaSalle site, to shield Johnson's and its subcontractors' employees from discipline should they refuse to report for work at the site.

In any apparent effort to supply such evidence, reliance is placed on the stipulated fact that the Respondent's agents ''briefly spoke with . . . individuals employed by Johnson and its union subcontractors'' to whom handbills were handed. Yet, there is no evidence as to what had been said during any of those brief exchanges. Without such evidence, the Board has held that the occurrence of communications between a labor organization and employees does not, of itself, serve to establish unlawful inducement or encouragement. *Painters Local 829 (Theatre Techniques, Inc.)*, 243 NLRB 27, 28 (1979). ''Evidence that a union official merely spoke to a neutral employee during the course of a labor dispute is not evidence of an unlawful object.'' *Operating Engineers Local 12 (Cal Tram Rebuilders)*, 267 NLRB 272, 274 fn. 4 (1983). Nor, standing alone, should it be sufficient to establish unlawful inducement or encouragement, inasmuch as, ''The burden of establishing every element of a violation under the Act is on the General Counsel.'' *Western Tug & Barge Corp*., 207 NLRB 163 fn. 1 (1973).

Much is made of the stipulated fact that the Respondent had ''engaged in area standards picketing of Automation'' on March 5. However, there is no allegation that the Act had been violated by that brief period of picketing. Moreover, it is further stipulated that that picketing had ceased ''after [the Respondent] was informed that Automation, Inc. was not yet working at that site.'' If anything, the Respondent's cessation of picketing tends more to indicate that the object of its conduct at Warshawsky's project had been primary, than to indicate that its object had been a secondary one.

Implicit in a message ''that Automation, Inc. was not yet working at that site'' is an obvious, but unstated, concomitant communication that Automation eventually will be ''working at that site.'' That the Respondent then chose to withdraw its pickets is some indication, though not a determinative one, of primary object. For, had its true object been to induce and encourage neutral employer's employees to withhold their services, to in turn ultimately compel Warshawsky to cease doing business with Automation, there would have been no need to withdraw the pickets simply because Automation's personnel had not yet arrived at the LaSalle project. Continued picketing might have led to Automation being prevented from ever being allowed by Warshawsky to work on the project. Beyond that, that 1 day of picketing was concededly ''area standards picketing.'' Of itself, such picketing is not encompassed by the prohibition of Section 8(b)(4)(B). See, e.g., *Gould Inc*., supra.

There is no evidence that the Respondent has a history, or has engaged in a pattern, of secondary harassment of neutral employers and their employees. There is no evidence of independent threats, coercion, or restraints directed to ''any person engaged in commerce or in an industry affecting commerce,'' within the meaning of Section 8(b)(4)(ii) of the Act. Thus, given the considerations set forth above, it cannot be concluded that the Respondent's mid-March handbilling, and the circumstances under which it had been conducted, rose to a level which allows it to be fairly characterized as statutorily proscribed ''signal picketing.''

Beyond that, the totality of the evidence will not support a conclusion that there had been inducement or encouragement within the meaning of Section 8(b)(4)(i) of the Act nor, given the absence of such evidence, that there had been threats, coercion or restraints encompassed within the meaning of Section 8(b)(4)(ii) of the Act. The handbill's message was a truthful one. It mentioned no employer other than Automation, without protesting Warshawsky's selection of Automation to perform the LaSalle rack and conveyor systems

installation work. Neither in the handbill nor, so far as the record discloses, by any other means did the Respondent appeal for support by employees of other employers working at the site. There is no evidence of support being offered to employees of neutral employers who might choose to refuse to report for work at the project. There is no evidence that handbillers patrolled, as would pickets, nor that they engaged in any other activity conveying that, in reality, they were picketing. There is no contention that the numbers of handbillers had been disproportionate to that which was needed to ensure distribution of handbills. In sum, there is no basis for concluding that it would have been ''reasonable for anyone approaching [Warshawsky's LaSalle] premises to conclude that picketing rather than handbilling was being conducted.'' (Footnote omitted.) *Teamsters Local 688 (Levitz Furniture)*, 205 NLRB at 1133.

Therefore, a preponderance of the evidence fails to establish that the Respondent engaged in statutorily prohibited conduct and, also, fails to establish that its handbilling had been for a statutorily prohibited object. Accordingly, I shall dismiss the complaint.

CONCLUSIONS OF LAW

Iron Workers Local 386, a labor organization, has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

It is ordered that the complaint be, and is, dismissed in its entirety.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.